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80-1310

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TRANSWESTERN PIPELINE COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February 3, 1981

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QUESTIONS PRESENTED

1. Can the Federal Energy Regulatory Commission (hereinafter sometimes referred to as "Commission") make what it calls "substantive revisions" of a regulation without complying with the notice and comment requirements of the Administrative Procedure Act and apply such revisions retroactively by labeling its action a "prospective clarification?"

2. Can the Commission decline to apply a clarification of an existing regulation in a pending rate proceeding by stating that such clarification is to have prospective effect only?

3. Did Petitioner have standing as an aggrieved party to obtain judicial review of the Commission's action in a rulemaking proceeding revising a regulation on which Petitioner was relying in a pending rate proceeding under circumstances in which such revision was in fact applied to deny Petitioner the relief it was seeking?

4. Under the circumstances of this case was Petitioner denied due process of law? [1]

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[1] The following are all the parent companies, subsidiaries, and affiliates of Transwestern Pipeline Company:
Texas Eastern Corporation
Skyline Oil Company
American Hydrocarbon Company
United States Copper Company
Western Carbon Company
Texas Eastern China, Inc.
Texas Eastern Developments, Inc.
Drilling Developments, Inc.
Texas Eastern Engineering (UK) Ltd.
Texas Eastern Guatemala, Inc.
Texas Eastern Sudan, Inc.
Texas Eastern Synfuels, Inc.
Texas Eastern Wyoming, Inc.
Texas Eastern Transmission Corporation
Allegheny Pipeline Company
Fannin Square Corporation
Houston Center Corporation
HCC Dev, Inc.
HCC Sub, Inc.
Texas Eastern LNG, Inc.
Transwestern Coal Gasification Company
Transwestern Gas Supply
La Gloria Oil & Gas Company
McMurray Pipe Line Company
Millray, Inc.
North Sea, Inc.
Texas Eastern (UK) Ltd.
Pyrofax Gas Corporation
TETCO Three, Inc.
TETCO Four, Inc.
TETCO Five, Inc.
TETCO Six, Inc.
Texas Eastern (Bermuda) Ltd.
TETCO (Bermuda) One Ltd.
Texas Eastern Arabian Ltd.
Texas Eastern International Petroleum (Bermuda) Ltd.
Texas Eastern Communications, Inc.
Texas Eastern Cryogenics, Inc.
Texas Eastern Engineering, Inc.
Texas Eastern Exploration of Canada Ltd.
Texas Eastern Exploration Co.
Texas Eastern International Services, Ltd.

(Continued on next page)

LIST OF PARTIES TO THE PROCEEDING IN THE FIFTH CIRCUIT

Transwestern Pipeline Company

Federal Energy Regulatory Commission

People of the State of California and the Public Utilities Commission of the State of California

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Texas Eastern Norway A/S
Texas Eastern Nuclear, Inc.
Texas Eastern Pipeline Corporation of New York
Texas Eastern Pipeline Corporation of Pennsylvania
Texas Eastern Shipping, Ltd.
Texas Eastern Transport Ltd.
Texas Eastern Storage Inc.
Texas Eastern Terminal Company
Trans-Ohio Pipeline Company
Algonquin Energy, Inc.
Transwestern Pipeline Company
Federal Energy Regulatory Commission
People of the State of California and the Public Utilities Commission of the State of California
Texoma Pipe Line Company

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OPINIONS BELOW

The first opinion of the court of appeals staying proceedings in Petitioner's first petition for review is reported at 589 F.2d 231. It is reprinted in the Appendix hereto, *infra* pp. 13-14. The second opinion of the court of appeals is not yet reported. It is reprinted in the Appendix hereto, *infra* pp. 1-12. The Federal Energy Regulatory Commission's Order Prescribing Changes in Accounting and Rate Treatment for Research, Development and Demonstration Expenditures, Order No. 566, Docket No. RM76-17, and Order Denying Petition for Rehearing of Order No. 566, are not reported. They are printed in the Appendix hereto, *infra* pp. 32-83 and 84-88, respectively. The Commission's Opinion and Order Affirming in Part and Modifying in Part Initial Decision, Opinion No. 43, in Docket No. 75-74, issued June 25, 1979, and Opinion and Order Granting in Part and Denying in Part Applications for Rehearing and Modifying Prior Order, issued August 23, 1979 are not reported. They are reprinted in the Appendix hereto, *infra* pp. 100-116 and 117-120, respectively.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1980. The order of the court of appeals denying rehearing of its prior order was entered on November 5, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), and §19(b) of the Natural Gas Act, 15 U.S.C. §717r(b).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), provides as follows:

> (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or

has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

The currently effective definition of "Research, Development, and Demonstration", Section 28B of the Federal Energy Regulatory Commission's Uniform System of Accounts for Class A and Class B Natural Gas Companies, 18 C.F.R. Part 201 was promulgated in Order No. 566, Order Prescribing Changes in Accounting and Rate Treatment for Research, Development and Demonstration Expenditures, Docket No. RM76-17, issued June 3, 1977, and is reprinted in the Appendix hereto, *infra* pp. 69-70.

The definition of "Research and Development" in effect prior to the effective date of Order No. 566 was promulgated in Order No. 483, Research and Development, Accounting and Reporting, Docket No. R-462, issued April 30, 1973, and provided as follows:

> 28.B. "Research and Development" means expenditures incurred by natural gas companies either directly or through another person or organization (such as research institute, industry association, foundation, university, engineering company or similar contractor) in pursuing research and development activities including experiment, design, installation, construction or operation. Such research and development costs should be reasonably related to the existing or future utility business, broadly defined, of the company or to the environment in which it operates or expects to operate. The term includes but is not limited to: all such costs incidental to the design, development or implementation of an experimental facility, a plant process, a product, a formula, an invention, a system or similar items, and the improvement of already existing items of a like nature; amounts expended in connection with the proposed development and/or proposed delivery of substitute or synthetic gas supplies (alternate fuel sources for example, and experimental coal gasification plant or an experimental plant synthetically producing gas from liquid hydrocarbons); and the costs of obtaining its own patent, such as attorney's fees expended in making and perfecting a patent application. The term does not include expenditures for efficiency surveys; studies of management, management

techniques and organization; consumer surveys, advertising, promotions, or items of a like nature.

STATEMENT OF THE CASE

As of September 30, 1975, Petitioner had expended approximately $9,500,000 in connection with the investigation, design, and development of a commercial-scale coal gasification facility known as the WESCO project. Petitioner undertook to recover such costs as RD&D expenditures in a rate increase proceeding filed with the Federal Energy Regulatory Commission on March 14, 1975, in Docket No. RP75-74. Petitioner's contention that such costs qualified for RD&D treatment was based upon its interpretation of the Commission's definition of qualifying expenditures as set forth in §28B of the Commission's Uniform System of Accounts, 18 C.F.R. Part 201.[2]

The principal point of controversy in Docket No. RP75-74 was whether the Commission's definition of permissible RD&D costs, which specifically included "an experimental coal gasification plant", encompassed Petitioner's expenditures. Petitioner maintained it did. The Commission Staff and the People of the State of California and the California Public Utilities Commission maintained that it did not.

During the pendency of this rate proceeding, the Commission issued a Notice of Proposed Rulemaking in Docket No. RM76-17, proposing certain changes in its rules governing an optional procedure for obtaining advance approval of RD&D expenditures, an issue unrelated to Petitioner's rate proceeding.

On June 3, 1977, the Commission issued Order No. 566, adopting the proposed rules with some changes. While expressly recognizing that it was "not a part of the proposed rulemaking",[3] the Commission nevertheless agreed to the request of certain parties for "clarification" of the definition of "Research and

[2] Costs qualifying for RD&D treatment are included in the utility's rate base. 18 C.F.R. § 154.32(d).
[3] Order No. 566. Appendix at 35.

Development", and added the following sentence to the definition:

> This definition includes expenditures for the implementation or development of new and/or existing concepts until technically feasible and commercially feasible operations are verified.

Order No. 566. Appendix at 57.

The Commission stressed that the definition was being clarified, not changed:

> The Commission confirms that this rulemaking does not cancel or alter present practice. It clarifies existing regulations and adds an additional procedure for advance approval of RD&D programs. . . . . The existing definition of RD&D is not eliminated. It will be clarified as previously discussed.

Id. Appendix at 37.

By application for rehearing, the People of the State of California and the California Public Utilities Commission, participants in Petitioner's Docket No. RP75-74 rate proceeding, pointed out that such interpretation would permit Transwestern to prevail in its rate case. The Commission responded with an order issued August 3, 1977, for the first time characterizing Order No. 566 as *expanding* the prior definition of Research and Development. It stated that it:

> did not intend Order No. 566 to be applied so as to allow retroactive rate base treatment of amounts which would not be accorded such treatment under prior definitions of R&D. Rate base treatment and tracking of costs associated with commercial-scale demonstration projects are to be prospective from June 3, 1977, the date of issuance of Order No. 566.

Order Denying Petition for Rehearing of Order No. 566. Appendix at 88.

Petitioner applied for rehearing and conditionally sought leave to intervene if formal party status were deemed necessary for

purposes of receiving and considering its application for rehearing. By order issued September 30, 1977, the Commission granted the conditional petition for purposes of further consideration. On January 9, 1978, the Commission denied "reconsideration" and intervention.

On January 10, 1978, Transwestern filed in the Court of Appeals for the Fifth Circuit a petition for review of these orders of the Commission dealing with the definition of RD&D expenditures. That petition was docketed in No. 78-1090. The principal issue presented was whether the Commission could "clarify" its RD&D definition only prospectively so as to exclude prior costs associated with commercial-scale demonstration projects. The Commission moved to dismiss on the ground that Petitioner was not aggrieved, arguing that the Commission had not yet decided Petitioner's pending rate case.

On February 7, 1979, the court issued a decision stating that review of the Commission's orders was premature at that time, in light of Petitioner's pending rate case. Accordingly, the court stayed the proceedings in No. RP78-1090 pending the outcome of Petitioner's rate proceeding at the Commission.

On June 25, 1979, the Commission issued Opinion No. 43 in Docket No. RP75-74 denying Transwestern RD&D treatment for the WESCO project costs on the sole basis that its order on rehearing of Order No. 566, giving prospective only effect to its clarification of the definition of RD&D, was dispositive.[4] It

[4] It did so by holding that the issue was controlled by an earlier decision in *Northern Natural Gas Company*, Order Affirming in Part and Modifying in Part Initial Decision, Opinion No. 14, Docket Nos. RP72-127 and R&D 75-1, issued May 10, 1978. This order is reprinted in the Appendix hereto, *infra*, pp. 121-158. The Commission thereafter applied the prospective effect of Order No. 566 to a commercial-scale project which employed the same Lurgi gasification process as had WESCO and held RD&D treatment appropriate. *Great Plains Gasification Associates*, Docket No. CP78-391, Opinion No. 69, issued November 21, 1979, and Opinion No. 69-A, issued January 21, 1980, *reversed sub nom. Office of*

denied rehearing without further comment in Opinion No. 43-A, issued August 23, 1979.

Petitioner petitioned for review in the Fifth Circuit of Opinion Nos. 43 and 43-A on August 27, 1979. That petition was docketed in No. 79-3053. Upon request by Petitioner, the appeals in Docket No. 79-3053 and No. 78-1090 were consolidated for review.

The court dismissed the petition for review in No. 78-1090 on the ground that Petitioner had not suffered "the 'irreparable' harm necessary to reviewability" in that, the Court reasoned, "[a]ny adverse effect the rulemaking proceedings had on Transwestern could clearly have been 'altered by subsequent administrative action' ". Appendix p.10. It affirmed, however, the Commission's ruling that Petitioner should not be accorded RD&D treatment for costs associated with the WESCO project, relying on the Commission's representation that commercial-scale demonstration projects were not entitled to RD&D treatment until the effective date of the Order No. 566 "clarification" of RD&D, and concluding that there was no error in the Commission's refusal to apply its "clarification" of the definition of RD&D to Petitioner's expenditures. In this respect it stated "it is obvious that Order 566 established, for the first time, the applicability of the RD&D definition to commercial-scale demonstration facilities." Appendix p. 11.

Petitioner now seeks review of this decision by this Court.

REASONS FOR GRANTING THE WRIT

1. The effect of the decision of the Court below is to permit an administrative agency to circumvent the notice and comment requirements of the Administrative Procedure Act in making "substantive revisions" [5] in a regulation by issuing what the

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Consumers' Counsel v. *FERC*, No. 80-1303 (D.C. Cir. filed Dec. 8, 1980) (not yet reported).

[5] This is the Commission's characterization of its action. *See* Order on Rehearing, Appendix p. 96.

agency denominates a "clarification" of that regulation and stating that such clarification will have prospective effect only. Whether an agency can lawfully do so is an important question of broad applicability which, insofar as Petitioner has been able to ascertain, this Court has not decided but should decide.

It is clear from a reading of Order No. 566 and the Notice of Proposed Rulemaking which preceded it, that the Commission did not, by that Order, purport to change the definition and thus the scope of expenditures which qualify for research and development treatment under its regulations. It repeatedly emphasized that it was merely "clarifying" the existing definition. As only a "clarification" of an existing regulation was involved, no notice was required under the provisions of the Administrative Procedure Act. *See* 5 U.S.C. §553(b)(A). It was the Commission's subsequent determination in the August 3, 1977, order on rehearing that it had made changes in its regulations by a "prospective" clarification which was in effect a substantive rulemaking which changed the scope of the definition of research and development.

The court below recognized that the language added to the definition of RD&D in Order No. 566 was the result of a request for clarification to remove an ambiguity in such definition. However, it accepted without analysis the Commission's explanation that applicability of the RD&D definition to commercial-scale demonstration facilities was properly prospective only since this was the first time commercial-scale demonstration projects were "expressly" covered by the RD&D definition.

Although the "clarification" of the definition of RD&D adopted in Order No. 566 was an interpretation, the August 3, 1977, order cannot logically be viewed as an interpretation. If Order No. 566 "clarified" the meaning of the existing definition of R&D, as the Commission purported to do, such "clarification" cannot logically be interpreted to be prospective only. It is

submitted that in logic there can be no such thing as a prospective only clarification. Either Order No. 566 was "interpretative" in which case no notice and opportunity to comment were required, but application to Petitioner's pending, unresolved rate proceeding was required or it was "adjudicative" in which case notice and opportunity to comment were required. Cf. *Brown Express, Inc.* v. *United States*, 607 F.2d 695 (5th Cir. 1979).

2. The decision of the court below in determining aggrievement and thus standing to obtain judicial review on whether adverse effect of agency action could *theoretically* be altered by subsequent administrative action conflicts with the decisions of this Court and of the United States Courts of Appeals for other circuits. Petitioner was held not to have standing and its petition to review the rulemaking orders dismissed on the ground that it had not suffered "irreparable harm" because, the Court reasoned, "[a]ny adverse effect the rulemaking proceedings had on Transwestern could clearly have been 'altered by subsequent administrative action' " Appendix p. 10. In virtually every case, the general effect of a rulemaking order can be altered by subsequent agency action in applying that order to a specific matter at issue. [6]

This Court has held that the determination of whether a party is "aggrieved" turns on whether the party "shows injury in fact" to an interest "arguably within the zone of interest to be protected or regulated" by the agency under the applicable statute. *Sierra Club* v. *Morton*, 405 U.S. 727, 733 (1972); or whether the party has "sufficient interest to bring to the attention of the

[6] The court below relied on its prior decision in *Atlanta Gas Light Co.* v. *FPC*, 476 F.2d 142 (5th Cir. 1973). The issue in that case, however, was one of finality, not standing to seek judicial review. The court there held that an admittedly interlocutory order of the Commission was reviewable, although not final, because it was definitive in its impact upon the rights of the parties. 476 F.2d at 148. The court simply confused the test of "finality" with the test for standing.

appellate court errors of law in the action of the Commission," *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940).

In *Association of Data Processing Service Organizations, Inc.*, v. *Camp*, 397 U.S. 150 (1970), this Court observed that "the trend is toward enlargement of the class of people who may protest administrative action" 397 U.S. at 154, while in *Barlow* v. *Collins*, 397 U.S. 159 (1970), it stated:

> As we said in *Data Processing Service*, preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. See *Leedom* v. *Kyne*, 358 U.S. 184; *Harmon* v. *Brucker*, 355 U.S. 579; *Stark* v. *Wickard*, 321 U.S. 288; *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94. Indeed, judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated. In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, we held that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." A clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297. It is, however, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that the courts should restrict access to judicial review. *Abbott Laboratories* v. *Gardner, supra*, at 141.

397 U.S. at 166-67.

The decision below, which narrowly defines aggrievement and denies a standing to appeal on a theoretical concept notwithstanding a demonstrated fact of injury, conflicts with these cases. It likewise conflicts with the decisions in other circuits which have applied the rule of the above cases to §19(b) of the Natural Gas Act and recognized standing to seek judicial review by one "likely to suffer injury by [the Commission's] determination," *City of Pittsburgh* v. *FPC*, 237 F.2d 741, 746 (D.C. Cir. 1955); *Sunray DX Oil Company* v. *FPC*, 351 F.2d 395, 400

(10th Cir. 1965); *see also Cincinnati Gas & Electric Co.* v. *FPC*, 246 F.2d 694 (D.C. Cir. 1957); *Northwestern Public Service Co.* v. *FPC*, 520 F.2d 45[4] (D.C. Cir. 1975).

The ultimate result of the decision of the court below was to deny Petitioner judicial review of a decision by the Federal Energy Regulatory Commission that the definition of RD&D in effect at the time expenditures by Petitioner were made did not cover costs which Petitioner incurred in connection with its WESCO project. Here the fact of aggrievement was established and the subsequent administrative action did *not* alter the adverse effect on Petitioner of the Commission's orders in the rulemaking proceeding. [7]

3. Finally, this case presents fundamental questions of fairness and due process. The Commission's action in stating rulemaking proceeding at California's request that its clarification of §28B in the rulemaking proceeding would be prospective only and in subsequently applying its rulemaking orders to foreclose Petitioner in its rate case is in itself so extreme as to warrant review by this Court. An administrative agency should not be permitted to foreclose judicial review by stating that it will exempt a pending controversy from the effect of an interpretation or clarification of a regulation there at issue and subsequently invoke that clarification as the sole basis for its decision. This is what occurred here. Petitioner has been "whip-sawed" by

[7] This case is extraordinary in that it considered on a consolidated basis both the appeal from the rulemaking orders and the appeal from the rate proceeding in which the adverse effect of the rulemaking orders were felt. In the usual case, a petitioner will not be able to show the actual adverse effect of a rulemaking order in a specific fact situation. Thus, if, as the Fifth Circuit says, aggrievement *vel non* turns on whether a party can theoretically be relieved of the adverse effect of a rulemaking by subsequent administrative action, there will be few who will have standing to seek judicial review.

the decision of the court below in denying it standing to challenge the orders in the rulemaking proceeding and then in applying such orders to affirm the Commission in the rate case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 3, 1981